

Fair Political Practices Commission

MEMORANDUM

TO: Chairman Getman, Commissioners Deaver, Makel, and Scott

FROM: Cyrus J. Rickards
Chief, Enforcement Division

DATE: August 30, 1999

SUBJECT: Handling of Requests for Civil Actions Against Major Donors

I. Introduction

Since August of 1998, the Enforcement Division has received 347 requests, pursuant to Government Code section 91007, from individuals requesting that the Commission undertake enforcement actions against persons who have allegedly violated the Political Reform Act. The overwhelming majority of these requests, 309, allege non-compliance with the disclosure requirements for major donor committees. This number constitutes approximately one-third of the total cases opened by the Enforcement Division during the 12-month period, August 1998 - August 1999.

How the Enforcement Division should handle the unprecedented volume of requests for civil actions against major donors has generated significant staffing and policy questions for the Commission. At the August 6, 1999, meeting the Commission directed Enforcement Division staff to examine various policy options regarding how these requests may be handled, and to make recommendations for the handling of these requests, for the Commission's consideration. This memorandum is offered in response to that directive.

II. Staff Recommendation

It is the recommendation of Enforcement Division staff that the Commission institute a streamlined prosecution program, as outlined in *Option 4* below, to effectively deal with this large volume of requests for civil actions targeted at major donors who have failed to comply with either semi-annual or late contribution disclosure requirements. Enforcement Division staff also recommends that the Commission simultaneously consider making legislative and regulatory changes regarding major donor reporting and civil action requests, as outlined below.

III. Background

The Political Reform Act (California Government Code section 81000, *et seq.*) requires major donor committees to file semi-annual campaign statements and late contribution reports, as

specified in Government Code sections 84200 and 84203.¹ A major donor committee is defined in section 82013 as any person or combination of persons that directly or indirectly “makes contributions totaling \$10,000 or more in a calendar year to, or at the behest of, candidates or committees.”

Historically, the Enforcement Division has followed a case-by-case approach when determining whether to prosecute major donors for non-compliance with their disclosure requirements. Common factors taken into consideration when determining whether to prosecute a major donor were, generally, public harm, and, specifically, the number of donations involved, the dollar amount of the donations, whether the donor had previously filed major donor reports, whether the donor had been advised of the disclosure requirements, whether the donor had a prior history of Political Reform Act violations, and the available resources of the Enforcement Division. Under this approach, Enforcement Division staff handled many violations by simply issuing a warning to the violator. Other violations were vigorously prosecuted, depending upon the overall circumstances of the violation.

Beginning in August of 1998, the Enforcement Division began to receive a series of requests, pursuant to sections 91004 and 91007, that the Commission initiate enforcement proceedings against persons who were alleged to have violated the disclosure requirements for major donors. The requests were typically received in large batches of up to fifty requests at a time.

Section 91004 permits any person, who resides within the jurisdiction where a campaign reporting violation occurs, to bring a civil action against the violator. Before such an action may be brought, the would-be plaintiff must first comply with the procedural requirements of section 91007.

Section 91007, subdivision (a) requires a would-be plaintiff to file with the civil prosecutor, (which pursuant to section 91001, subdivision (b), is the Commission for disclosure violations regarding state-wide elections) a written request for a civil action to be commenced against an alleged violator. The civil prosecutor is then required to respond within forty days after receiving the request, indicating whether or not a civil action will be filed. If the civil prosecutor responds that an action will not be filed, the plaintiff is immediately free to file a civil action. If the civil prosecutor indicates that a civil action will be filed, the would-be plaintiff is prohibited from filing a civil action for an additional forty days. Upon the expiration of this second forty-day period, if the civil prosecutor does not file a civil action, then the would-be plaintiff is free to file a civil action regarding the alleged violation. If the civil prosecutor files a civil action before the expiration of the second forty-day period, the would-be plaintiff is

All further statutory references are to the Government Code, unless indicated otherwise.

permanently barred from bringing a civil action for the alleged violation, unless the civil prosecutor's action is subsequently dismissed without prejudice.²

In response to the 309 requests for civil actions that the Enforcement Division has received regarding major donor violations, only one was prosecuted civilly by the Commission; 39 were handled administratively by the Commission, 73 are still pending, and the remainder were left for the requestors to pursue civilly.

IV. Analysis

Before arriving at its recommendation, Enforcement Division staff considered several different options for dealing with requests for civil actions against major donors. Each of these options is set forth below, along with a discussion of the relative advantages and disadvantages of each option.

Option 1: Prosecute All Cases Appearing Meritorious

Under this option, every request for civil action that credibly describes a major donor violation would be prosecuted by the Enforcement Division. The decision to prosecute would be made without regard to the seriousness of the violation, or the alleged violator's prior enforcement history, if any. In keeping with past practices, only the most egregious violations would be handled civilly. The remainder of the violations would be prosecuted administratively.

The advantages to this approach are that it is consistent, and it would give the Commission control over how all major donor cases are handled. Under this option, every alleged violator would be able to resolve his or her liability with the Commission, rather than having to deal with a private plaintiff.

The disadvantages to this approach are that the workload of the Enforcement Division would be dramatically increased. Cases would have to be handled with a high degree of urgency in order to meet the eighty-day deadline contained in section 91007 and major donors committing arguably *de minimis* violations would nonetheless be subjected to an enforcement action. Pursuit of this option would necessarily require deferring or abandoning the prosecution of other violations of the Political Reform Act.

² A.B. 1274 has recently been passed by both houses of the Legislature, and is now awaiting the Governor's signature. This bill would amend section 91007 to replace the two consecutive forty-day periods discussed above, with a single-120-day period.

We further note that section 91007 does not specifically provide for an administrative action being undertaken in response to a request for the filing of a civil action. Nonetheless, section 91008.5 provides that no person may file a civil action for a campaign disclosure violation after the Commission has issued an administrative order against the violator for the same violation. We therefore conclude that the Commission may respond to requests for civil actions against major donors by bringing an administrative action, and that such an action, when resolved by an administrative order of the Commission, constitutes a bar to further civil proceedings.

Option 2: Defer to the Requestor in All Cases

Under this option, the Enforcement Division would decline to prosecute any major donor violations described in a request for civil action.

The primary advantage to this approach is that it would save the Commission from having to expend its resources to prosecute major donor violations in instances where a private litigant has expressed a willingness to do so. The disadvantage to this approach is that the Commission would have no control over how the alleged violations are addressed.

Option 3: Prosecute Only Those Major Donor Cases That Satisfy Established Standards

Under this option, the Enforcement Division would institute enforcement actions regarding alleged major donor violations based on Commission-endorsed standards that would be established for all major donor cases, regardless of whether they arise from a request for civil action, or by the more common complaint processes. If a request for civil action describes a violation that satisfies the Commission's standards for prosecution, the Enforcement Division would respond to the request by instituting an action. If the request describes a violation that does not satisfy the criteria, the Enforcement Division would decline to institute an action.

The prosecution standards established by the Commission could include one or more of the following: the number of donations involved; the dollar amount of the donations; whether the donor had previously filed major donor reports; whether the donor had previously been notified of the disclosure requirements; and whether the donor had any previous history of Political Reform Act violations.

In considering this option, Enforcement Division staff concluded that if a case satisfied either of two criteria, it should be prosecuted: (1) the total contributions made by the major donor during a calendar year exceeded \$50,000; or (2) the major donor made contributions during the calendar year to three or more candidates or committees.

The primary advantage to this approach is that it is consistent and does not force the Commission to take action on violations not meeting the established standards in response to a request pursuant to sections 91004 and 91007. Another advantage is that it allows the Commission to maintain control over those major donor cases which, as described in its prosecution criteria, it deems to be significant. Additionally, depending upon the breadth of the prosecution criteria that are established, this option allows the Commission to control the amount of Enforcement Division resources that will be expended on major donor cases, instead of other, arguably more serious cases.

The primary disadvantage to this option is that by the Commission setting prosecution standards that apply to all cases, alleged violators whose cases do not satisfy the Commission's prosecution criteria would be entirely subject to private plaintiffs. This could result in some minor violators being penalized more severely in civil actions brought by private plaintiffs than more serious violators are penalized in actions brought by the Enforcement Division. This

option would also mean that some violations simply would not be addressed by an enforcement action, unless there are private plaintiffs interested in pursuing them.

Option 4: Institute a Streamlined Prosecution Program

Under this option, the Commission would institute a streamlined prosecution program designed to swiftly and efficiently resolve most non-aggravated major donor cases by a stipulated administrative settlement. The program would cover cases in which a major donor has allegedly violated section 84203 and/or section 84200 by failing to report one or more contributions in a late contribution report and/or a semi-annual campaign statement, unless: (1) the total amount of the non-reported contributions is \$50,000, or more; (2) the major donor has failed to report contributions of \$10,000, or more, to three or more candidates and/or committees; (3) the major donor has previously been the subject of an enforcement action, or has been issued a warning letter by the Enforcement Division, as a consequence of a Political Reform Act violation; (4) there is evidence that the major donor has committed other violations of the Political Reform Act that may be prosecuted; or (5) there are other extraordinary factors present that would make inclusion of the case in this streamlined prosecution program otherwise inadvisable. Using these criteria, over eighty percent of all major donor cases referred to the Enforcement Division, either by requests for civil actions, or by complaints from the public, should be eligible for this program.

When a major donor violation is brought to the attention of Enforcement Division staff, either by a request for civil action, or by a complaint from the public, the case would be evaluated immediately to determine if it is eligible for the streamlined prosecution program. If the case is found to be eligible for the program, a member of the Enforcement Division staff would attempt to contact the alleged violator. During this contact, the alleged violator would be offered an opportunity to enter into a stipulated administrative settlement of the case with the Commission, provided the violator also agrees, as a prerequisite for any settlement of the case, to make all required major donor disclosures that had not previously been made.

The stipulations for major donor cases handled through the program would have a greatly simplified format, intended to provide the Commission and the public with all of the essential information about the case, while keeping the amount of time and effort that must be expended for any particular stipulation to a minimum. Such stipulations would therefore only be likely to include the name of the respondent, the statute(s) violated, the number of contributions made, the dollar amount contributed, and the name of the recipient of each contribution.

The amount of fine that would be imposed upon a major donor violator, pursuant to stipulation, would be in a low, fixed amount per violation, depending upon the statute violated, and the total amount of non-disclosed contributions. A violation of 84203 by a major donor, for failing to file a late contribution report, would prompt a higher fine than a violation of 84200 by a major donor, for failing to disclose a contribution in a semi-annual campaign statement, because of the greater public harm associated with the non-filing of a late contribution report, which would otherwise be available for public inspection prior to an election. Similarly, a major donor whose non-disclosed contributions exceed \$25,000 would be fined at a higher level than a

major donor whose non-disclosed contributions are less than \$25,000, because of the greater public harm associated with a larger amount of undisclosed contributions. The schedule of fines per violation would therefore be as follows:

Violation	Total Contributions Under \$25,000	Total Contributions \$25,000-\$49,999
Section 84200	\$200	\$400
Section 84203	\$400	\$800

Only under extraordinary circumstances would a stipulated fine vary from what is prescribed by this schedule.³

If an alleged major donor violator, who is eligible for the streamlined prosecution program, agrees to enter into an administrative stipulation with the Commission, the stipulation would be calendared for the Commission's next regularly scheduled agenda. Stipulations reached under this program would be presented to the Commission on a consent calendar.

If an alleged major donor violator declines to enter into a stipulation with the Commission, the donor's case would be removed from the streamlined prosecution program.

Major donor cases that are excluded from the streamlined prosecution program, either because they do not satisfy the program's criteria, or because the violator is unwilling to reach a stipulation with the Commission, would be evaluated for prosecution using the following traditional criteria: harm to the public generally, the number of donations involved; the dollar amount of the donations; whether the donor had previously filed major donor reports; whether the donor had been advised of the disclosure requirements; whether the donor has a prior history of Political Reform Act violations; and the available resources of the Enforcement Division.

Instituting a streamlined prosecution program of this kind to handle major donor cases has several advantages. First, the standardized nature of the program would assure that most major donor cases would be handled by the Commission, and that they would be handled in a fair and consistent manner. Second, the expedited procedures of the program would allow the Enforcement Division to expend fewer resources handling these cases than would be necessary under other options. Third, the flexibility of the program, by including a fine schedule, rather than just one fixed fine, and by allowing for the exclusion of aggravated cases from the program, would assure that more serious violations will be treated appropriately.

³ The fines imposed by the Commission would be separate from any late filing fees imposed by filing officers. We have recently learned that the Office of the Secretary of State has begun to impose late filing fees on all major donors filing late reports with that office.

The primary disadvantage to this option, in relation to some other options, is that the Enforcement Division would still have to expend significant resources handling major donor cases.

V. Legislative and Regulatory Changes

Regardless of which enforcement policy the Commission chooses to adopt, the Enforcement Division recommends the Commission direct its staff to propose legislative and/or regulatory changes regarding major donor reporting and civil action requests. The specific nature of these proposals are not addressed in this memorandum, but should include consideration of changes in major donor reporting requirements, including elimination of all or some of the major donor disclosure requirements, narrowing the definition of a major donor, and placing greater responsibility for major donor disclosure on recipient committees. Ideas for consideration regarding changes in the law governing civil action requests would include more clearly defining the relationship between civil actions brought by private individuals and enforcement actions brought by the Enforcement Division, and providing safeguards against private plaintiffs using the enforcement provisions of sections 91004 and 91007 in a manner at odds with the responsibilities of the Commission.

V. Conclusion

The recommendation of a streamlined prosecution process combined with a more traditional analysis is an attempt to deal with a new reality created by the recent unprecedented use of the “civil prosecutor” function. It is an attempt to allow the Commission to retain substantial control over how the Political Reform Act is enforced, while at the same time allowing for flexibility to deal with individual cases.